Nos. 91-261, 91-274

In the Supreme Court of the United States

October Term, 1991

THE MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., ET AL.
Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.
Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, MASSACHUSETTS, MINNESOTA, NEW JERSEY, PENNSYLVANIA, WYOMING, AND THE COMMONWEALTH OF NORTHERN MARIANA ISLANDS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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ISSUE PRESENTED

Does the National Labor Relations Act clearly express an intent to preempt states and their subdivisions from determining labor relations policy on their own public works projects in the manner that Congress expressly authorized for the private construction industry?

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STATEMENT OF INTEREST OF AMICI CURIAE

The states identified above submit this brief amici curiae to urge the Court to grant certiorari. This brief emphasizes the federalism concerns inherent in the public construction and procurement contexts. The amici argue that State and local agencies maintain

flexibility over labor agreements on their own public works projects, and that the National Labor Relations Act ("NLRA") does not preempt local control.

The amici are sovereign states that possess the authority over public works projects within their jurisdictions. In addition to the project labor areements cited in the Trade Council's petition (No. 91-261), pp. 12-13, n.5 and in the MWRA's petition (No. 91-274), p. 12, the projects set forth in the margin have been completed under project labor agreements.[1/] The reasoning of the

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1/ In the Minneapolis-St. Paul metropolitan area, there have been dozens of recent public works projects that have been completed under project labor agreements, including the following: the Hubert H. Humphrey Metrodome, the new University of Minnesota Hospital, the Minneapolis

(footnote continued)

majority opinion below alters the balance of state and federal control over such public works projects.

In particular, the amici view this case as an important test of their control over labor relations on state and local public works projects. A definitive affirmation of those powers in this case would preserve the constitutional balance of power between the states and the Federal Government and provide guidance to states who wish to exercise their powers in accordance with principles of federalism.

(footnote continued)

Waste-to-Energy Plant, the Minneapolis Convention Center, the Nicollet Mall Project, the Hennepin County Government Center, the St. Paul Civic Center, the Ramsey County Courthouse renovation, and the Seneca, Blue Lake and Empire waste-water treatment facilities.

The interest of the amici transcends any dispute over the particular content of the project labor agreement in this case. The amici seek to preserve the constitutional balance between the powers of the Federal Government and those of the states, as established by the framers of the Constitution. They seek to preserve the states' autonomy and their identities as independent repositories of sovereign authority within our federal system.

ARGUMENT

The majority opinion below reads into the National Labor Relations Act implied restrictions on labor relations on state and local government public works projects that do not apply to private projects. Congress has not expressed these restrictions expressly or even by necessary implication. On

the contrary, the NLRA authorizes the state action in question.

By finding preemption so readily here, the Court of Appeals holding violates the basic tenets of federalism that underlie our constitution. Gregory v. Ashcroft, 111 S.Ct. 2395 (1991).

1. The Court Should Grant Certiorari In Order To Correct The Imbalance Between State and Federal Authority Created By the Majority Opinion Below.

The holding of the majority below wrests control over public construction projects from the states and their subdivisions. As a result, states, public authorities and municipalities have lost flexibility over labor relations on their public works projects. This intrudes into the states' "substantial sovereign authority", thereby depriving the people of the benefits of decentralized

government that underlie the structure of our government:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id., 111 S.Ct. at 2399.

The principles of federalism apply with full force to a state authority's proprietary interests on its own public works project. In this case, all of the interests at stake implicate the right of the people and their local representatives to control local public works projects and to choose labor policy that will best serve the public

interest.[2/]

In Reeves, Inc. v. Stake, 447 U.S. 429, 437, 439 (1980), the Court found "no indication of a constitutional plan to limit the ability of the States

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2/ Most discussion regarding the states as proprietors, or as participants in the market, has occurred in the context of the dormant Commerce Clause. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). Cf. United Building & Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984) (privileges and immunities clause). It is true that these cases do not address the question of what the States may do, given enactment of the National Labor Relations Act. Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1978). Here, however, the NLRA does not withdraw state authority grounded in legitimate proprietary interests. Moreover, identifying the scope and purposes of the market participant doctrine sheds considerable light on what interests the MWRA may assert, as owner of the jobsite and as purchaser of construction labor for its own project.

themselves to operate freely in the free market", and noted that "the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."

Reeves' articulation of the states' "role . . .'" as guardian and trustee for its people"'", 447 U.S. at 438, is instructive here.[3/] The MWRA's

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3/ Reeves was quoting Heim v. McCall, 239 U.S. 175 (1915). In fact, the full quotation from Heim is even more pertinent:

> Atkin v. Kansas, 191 U.S. 207, 222, 223 . . . declared, and it was the principle of decision, that "it belongs to the State, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of municipalities."

Heim, supra, 239 U.S. at 191.

interests bear directly upon the efficient, expeditious and effective completion of the MWRA's sewerage treatment facilities themselves. The MWRA's duty to avoid the costs of delay, in the form of increased construction costs, potential fines, and environmental harm, falls squarely within its duty to its ratepayers and to the voters to manage its property and purchasing policies so as to achieve the greatest benefit from the Harbor cleanup project at the least cost. It would be a breach of that public trust to subject the MWRA's ratepayers to the costs and risks of delay.

The MWRA's requirement regarding Bid Specification 13.1 is limited to the "discrete, identifiable class of economic activity in which [it] is a

major participant." White, supra, 460 U.S. at 211, n.7. Without a compelling congressional direction, the Courts should not conclude that the otherwise lawful project labor agreement became unlawful because of the MWRA's involvement, which in turn arose only because of its strong proprietary interest in timely and cost-effective completion of its sewerage treatment facilities.

The MWRA, acting as proprietor of the construction site and of the sewerage facilities, should "share existing freedoms from federal constraints", Reeves, supra, 447 U.S. at 439, that are available to private parties under the NLRA. Even the majority below conceded that "the Master Labor Agreement between the Trades Council and Kaiser is a valid labor

contract". See A. 24a.[4/] If MWRA is to share existing freedoms from federal constraints, then it must be allowed to choose clauses that were explicitly authorized for private employers under sections 8(e) and 8(f) of the NLRA.

While Congress, acting under its constitutionally conferred powers, "may impose its will on the States," "[t]his is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." Gregory, supra, 111 S.Ct. at 2400.

The majority opinion below subverts this constitutional scheme by departing from the rule that "'a clear and manifest purpose' of preemption is

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4/ For convenience, the amici cite to the appendix of the MWRA's petition.

always required." Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988) (emphasis added). See also Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963) ("In other words, we are not to conclude that Congress legislated ouster of [a state statute] . . . in the absence of an unambiguous congressional mandate to that effect.") (emphasis added).

These considerations apply with full force to the NLRA challenge on the present facts. "The National Labor Relations Act leaves regulation of the labor relations of state and local government to the States." Abood v. Detroit Bd. of Education, 431 U.S. 209, 223 (1977). The exemption of the states from the definition of employer is strong evidence of congressional intent

in this regard. 29 U.S.C. § 152(2).

There are "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959); See also Gould, supra, 475 U.S. at 291 ("legitimate response to State procurement constraints or to local economic needs"). The cases demonstrate that the interests at stake here fall within this exception.

Nothing expressed or implied in the NLRA comes close to the type of Congressional statement that warrants preemption. 29 U.S.C. § 152(2) strongly supports the conclusion that preemption was not intended in the circumstances

alleged by ABC. A private employer in the construction industry has the benefit of Sections 8(e) and 8(f). A state using its own employees would be exempt from the NLRA under Section 2(2). It strains basic principles of federalism and logic to conclude that, without saying so, Congress intended to preempt the Agreement merely because a governmental party is involved.

2. The Court Should Grant Certiorari Because the Courts Of Appeals Are Misreading This Court's Decisions In A Way That Injures Federalist Principles.

In order to place greater burdens upon governmental employers and developers than upon private companies, the majority below relied on Gould, supra. Gould did not establish the broad, judge-made preemption that the Court below seems to apply. The decision below demonstrates the need for

this Court to define the limits of its decision in Gould.

Indeed, this Court distinguished the present context from the one in Gould, supra, 475 U.S. at 291:

> We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States.

See also, Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, n.8 (1985). Instead of using its procurement role to effect a regulatory purpose, here, MWRA is using that role to achieve procurement goals, which fall within the exceptions to Gould.

In the first place, Congress intended to allow the state to affect labor relations on state public works projects funded by state agencies on

state land. See U.S.C. § 152(2);[5/] Abood, supra, 431 U.S. at 223; New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 540-545 (1979).

Second, the District Court's findings regarding the origin of the labor provisions (App. 74a-76a) establish at least four important proprietary interests of the MWRA and the Commonwealth: (1) the need for labor peace and stability on the jobsite of a public works project owned by the MWRA, (2) avoiding the risk of substantial fines against the MWRA for non-compliance with the court-ordered

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5/ The Act provides that:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . 29 U.S.C. § 152(2) (emphasis added).

construction schedule, (3) increased costs to the MWRA in the event of delays caused by labor disputes, and (4) abating pollution of waters of the Commonwealth, namely the Boston Harbor. As the District Court found, events in the early stages of construction already had proven the need for labor peace and the potential for disruption of the project in the event of labor disputes. (App. 74a-75a).

The First Circuit's misapprehension of Gould has been echoed by a divided panel of the Eighth Circuit. See Glenwood Bridge, Inc. v. City of Minneapolis, 1991 U.S. App. Lexis 17422 (8th Cir. 1991). It is apparent that only a decision by this Court can establish the proper limits on the Gould doctrine.

3. The Court Should Grant Certiorari Now, Because The States Are Being Deprived of Their Sovereign Authority On Current Projects.

The injury to our federalist system effected by the First and Eighth Circuits has immediate and concrete consequences, which necessitate granting certiorari now. States and localities are losing their ability to safeguard their public trust on projects that are well underway, such as the Boston Harbor project. This injury cannot be remedied except by a decision from this Court. The "States are unable directly to remedy a judicial misapprehension of" Congressional intent regarding the federal-state balance. See Port Authority Trans-Hudson Corp. v. Feeney, 110 S.Ct. 1868, 1872 (1990) (discussing the Eleventh Amendment).

Unless the Court grants certiorari, the states and their subdivisions will be unable to respond effectively to the special conditions in the construction industry -- the very same conditions that led Congress to authorize project labor agreements on private construction projects:

> the short-term nature of employment, the impracticability of holding certification elections, the contractors' need for predictable cost and a steady supply of labor, and the longstanding custom of prehire bargaining in the industry . . .

App. 39a (Dissenting opinion of Breyer, C.J.), citing S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959).

The Boston Harbor Project, like many others across the nation, will not wait. Unless certiorari is granted now, many current public projects will be at a disadvantage compared to private

projects. States and their subdivisions will be unable to serve their public trust in the most effective fashion. Only a decision by this Court can return the authority over public projects where it belongs: in the hands of the public officials whose duty it is to serve the public and to carry out the wishes of the people's elected representatives.

CONCLUSION

This Court should grant the petitions for certiorari in Nos. 91-261 and 91-274.

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